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SUMMARY

Issues must be specified against Rita Reyna Brent to determine (1) whether her transmitter site has been continuously available to her and (2) whether Brent violated Section 1.65 of the Commission's rules.

Brent's opposition only confirms that she lacked reasonable assurance of site availability between April 1992, when the site was sold, and April 1993, when Brent finally contacted Patricia Harrison, the new owner of the site. The site was not available to Brent between the time of the sale and the time Harrison was finally contacted. The new letter from Harrison was not obtained in a timely manner.

Brent violated Section 1.65 by failing to report (1) the sale of her transmitter site and (2) the fact that the balance sheet she allegedly relied upon to certify her financial qualifications was "lost or misplaced". Contrary to Brent's arguments, she had clear duty to learn of and to report both matters. Brent's reporting failures meet the test for specification of a reporting issue.

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

AUG - 2 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of)
MARTHA J. HUBER, et al.) MM Docket No. 93-51
)
) File Nos. BPH-911114ME,
) et al.
For Construction Permit for a)
New FM Station on Channel 234A)
in New Albany, Indiana)

TO: Honorable Richard L. Sippel
Administrative Law Judge

**REPLY TO OPPOSITION TO SECOND PETITION
TO ENLARGE ISSUES AGAINST RITA REYNA BRENT**

Martha J. Huber (Huber), by her attorneys, now replies to the "Opposition to Second Petition to Enlarge Issues Against Rita Reyna Brent [Brent]" filed by Brent on July 21, 1993.

In her July 6, 1993 petition to enlarge issues, Huber demonstrated that (1) the transmitter site specified by Brent had been sold in April 1992, (2) Brent made no attempt to ensure that her site would remain available to her, (3) Brent did not obtain reasonable assurance of site availability from the new owner until April 1993, or one year after the site was sold and (4) Brent failed to report that the balance sheet that had been the basis of her financial certification had been lost. Brent makes no serious attempt to dispute these essential facts. Indeed, the opposition contains no declaration or explanation whatsoever from Brent. The opposition consists of meritless legal and factual arguments. Brent's opposition only provides further evidence that the

issues requested by Huber must be added.

I. HUBER'S PETITION WAS TIMELY

Brent argues that to the extent Huber's petition relates to Brent's transmitter site, the petition was untimely because the sale of that site took place in April 1992 and Brent produced on April 26, 1993 a reasonable assurance letter from Patricia Harrison, the new site owner. Brent Opposition, Pp. 1-5. Brent ignores the simple fact that Huber could not have properly filed a petition without obtaining certain information from Brent in a deposition. For instance, the April 1993 letter did not preclude the possibility that Brent had obtained oral assurance of site availability from Harrison in a timely manner. Only at Brent's deposition did it become clear that she had made no attempt to maintain her reasonable assurance and that one year had passed during which she had no agreement with Harrison. Similarly, Huber could not have filed for a Section 1.65 issue without fully ascertaining Brent's state of mind and the efforts she undertook to maintain site availability (or, in this case, utter lack of effort). Huber's petition was timely filed within fifteen days after she received the transcript of Brent's deposition.

Even if Huber's petition is somehow considered untimely, the petition would meet the standard set in Section 1.229(c) of the Commission's rules. The petition clearly raises a question of substantial public interest importance because it

relates to Brent's basic qualifications. In light of this

availability from the site owner for a period of one year, Huber's petition raised issues of potential decisional significance because there is a very strong likelihood that Huber could prove her assertions. Great Lakes Broadcasting, Inc., 6 FCC Rcd 4331, 4332, 69 RR 2d 946, 947 (1991). The petition must therefore be fully considered on the merits.

II. BRENT'S TRANSMITTER SITE WAS NOT AVAILABLE TO HER FOR A ONE-YEAR PERIOD

The heading for Section II of Brent's opposition reads, "Brent's antenna site has been continuously available to her since she filed her application in November 1991." Brent Opposition P. 5. That claim is patently false. The land was sold by Samuel Lockhart to Patricia Harrison in April of 1992. At that point in time, any reasonable assurance Lockhart offered became worthless, and Brent had an obligation to promptly obtain reasonable assurance from Harrison. Brent did nothing until April 1993, or one year after the sale, when she learned through chance that the land had been sold. During that interim period she lacked reasonable assurance of site

owner so long as the property owner states that the reasonable assurance "relates back" to the date the site was specified.¹ With respect to site availability, however, the Commission has stated:

A mere possibility that a site will be available is not sufficient...Commission requirements will be satisfied when an applicant has contacted the property owner and has obtained reasonable assurance in good faith that the proposed site will be available for the intended purpose.

In the Matter of Amendment of §§ 73.3572 and 73.3573 Relating To Processing of FM and TV Broadcast Applications, 58 RR 2d 776, 782 (1985) (emphasis added). Until April 1993, Brent had made no contact with Harrison, and she had no basis whatsoever for believing that Harrison would make the property available to her. Clearly, reasonable assurance does not exist before the property owner is contacted. Brent therefore lacked reasonable assurance between April 1992 and April 1993.

Huber demonstrated in her petition that the letter Brent eventually obtained from Harrison could not be considered because it was not diligently obtained. Huber Petition, Pp. 9-10, citing Imagists, 8 FCC Rcd 2763, 2765, 72 RR 2d 632, 635 (1993). Brent incorrectly claims that Huber "fails to cite a single case to support her draconian and bizarre 'interim unavailability' thesis." Brent Opposition, P. 5. Brent later attempts to distinguish the Imagists case by repeating her patently false claim that "Brent's transmitter site has always

¹ There is no meaningful distinction between Brent's dealings with Harrison and an applicant who initially specifies a site and waits until later to contact the site owner.

been suitable and available..." Brent Opposition, P. 9. The site issue requested by Huber must be added.

III. A SECTION 1.65 ISSUE MUST BE SPECIFIED AGAINST BRENT

Brent takes issue with Huber's showing that Brent committed multiple violations of Section 1.65 of the Commission's rules. Huber demonstrated in her petition that Brent violated Section 1.65 by not reporting (1) the sale of her transmitter site and (2) that the balance sheet she allegedly relied upon to certify her financial qualifications was "lost or misplaced". Contrary to Brent's arguments, she had a clear obligation to report both matters. Brent's repeated reporting failures meet the legal standard for a Section 1.65 reporting issue, and such an issue must be specified.

A. The Legal Standard

In her petition, Huber cited the classic test for a Section 1.65 issue contained in Merrimack Valley Broadcasting, Inc., 99 FCC 2d 680, 683-684 n.9, 57 RR 2d 713, 716 n.9 (1984), which states that a Section 1.65 issue will be specified when:

(1) unreported interests are of decisional significance, (2) an intent to conceal is present, or (3) a pattern of carelessness or inattentiveness is present.

Brent claims that Merrimack is no longer good law because it was superseded by Policy Regarding Character Qualifications in Broadcast Licensing, 102 FCC 2d 1179, 59 RR 2d 801 (1986). Brent Opposition, P. 6 n.7. Brent is simply wrong. The

Commission and the Review Board have continued to use the Merrimack test after the Commission's character policy statement was adopted. Thomas W. Lawhorne, 7 FCC Rcd 4341 (1992), Coast TV, 5 FCC Rcd 6720, 6723, 68 RR 2d 972, 976 (Rev. Bd. 1990).²

B. The Transmitter Site Sale

Brent's argument that she was not required to report the sale of her transmitter site is based upon the patently incorrect premise that she has always had reasonable assurance of site availability. As Huber has shown above, reasonable assurance consists of an understanding with the owner of the transmitter site. When the land was sold in April 1992, Brent no longer had any such agreement with the site owner. She had no way of knowing whether Harrison would agree to make the site available. Brent had nothing more than "a mere possibility that a site will be available", which does not constitute reasonable assurance. Amendment of Sections 73.3572 and 73.3573 Relating to Processing of FM and TV Broadcast Applications, supra. Until Harrison wrote her April 1993 letter, Brent had no assurance of site availability from Harrison.

Brent had a clear obligation to report the loss of her transmitter site and the concurrent loss of reasonable

² In any event, Brent admits that a reporting issue would be warranted if irresponsibility was indicated. Brent Opposition, P. 6 n.7. As Huber has shown in its petition and will show here, Brent's conduct reflects, at best, serious irresponsibility. Thus, even under the legal standard Brent offers, a reporting issue would be required.

assurance. In National Communications Industries, 6 FCC Rcd 1978, 69 RR 2d 51, 53 (Rev. Bd. 1991), the Board noted:

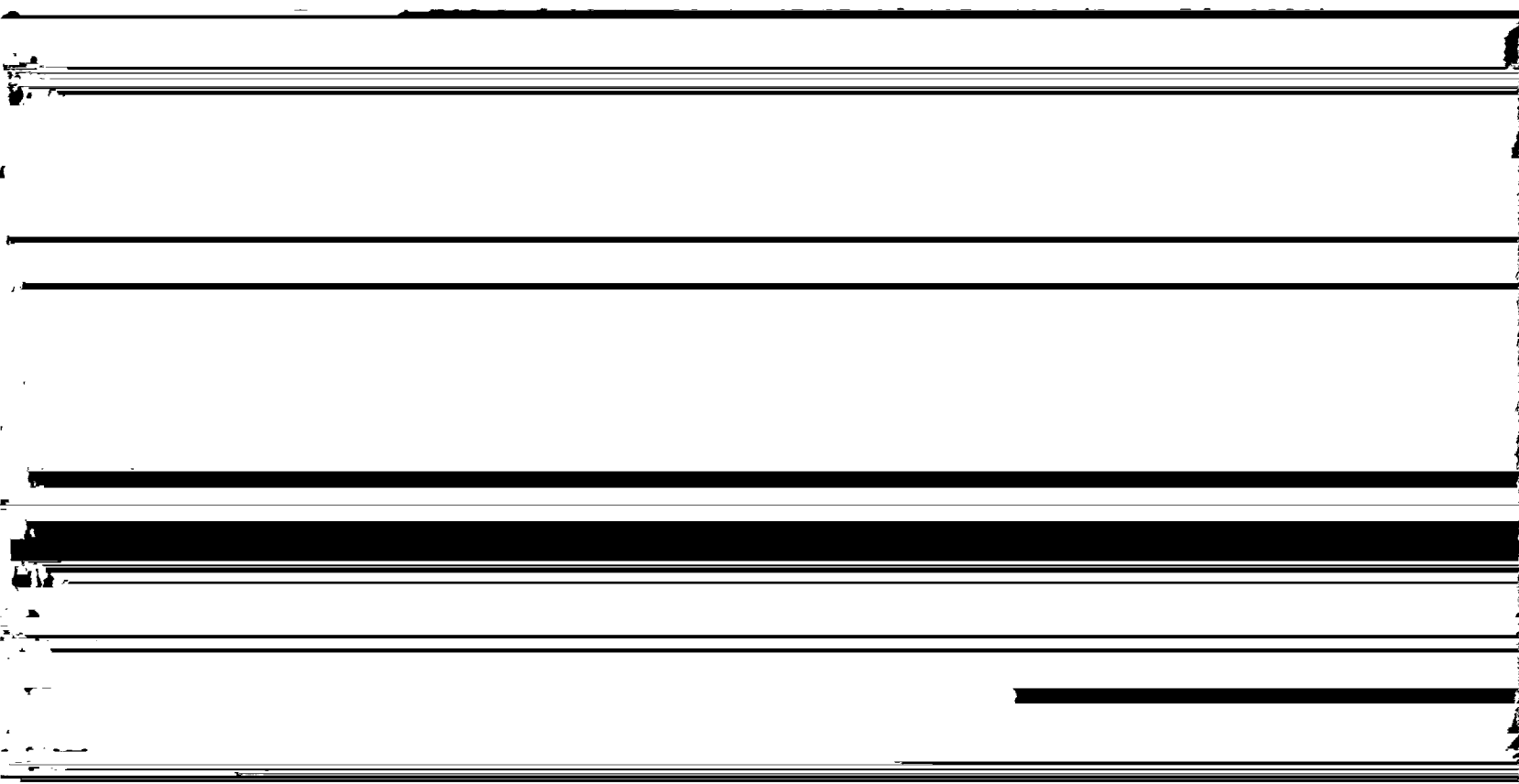
If the transmitter site becomes unavailable after an applicant certifies it has reasonable assurance, that significant change must be reported within thirty days, in accordance with 47 C.F.R. §1.65.

Brent has never made a full disclosure pursuant to §1.65. While she exchanged the letter she obtained from Harrison, she never informed the Commission that her site had been sold in April 1992 or that she had lacked reasonable assurance of site availability for one year. Indeed, Brent's document exchange was highly misleading because it appeared from the document that the sale had taken place recently. Contrary to Brent's suggestion (Brent Opposition, P. 6 n.8), she never made the complete and voluntary disclosure required by the Commission. It is beyond doubt that Brent violated §1.65.

~~Brent's basic defense to the specification of a 1.65~~

the continuing accuracy and completeness of information furnished in a pending application." It also requires that an applicant report "as promptly as possible and in any event within thirty days..." When a deficiency such as loss of site availability occurs, the applicant must cure that deficiency as soon as possible "after they learn, or should have learned, of the deficiency..." Imagists, supra (emphasis added). If Brent's theory was accepted, the words "or should have learned" would have to be eliminated.

Brent had an affirmative obligation to learn of the sale of the land well before she did. An applicant "must make ordinary efforts to assure that it maintains its site throughout the application process." Berea Broadcasting Co.,



been sold. If Brent had even made one phone call to Lockhart, she could have learned of the sale and attempted to reach an agreement with Harrison in a timely manner. Instead, she did nothing. Given her admission that she had an obligation to maintain reasonable assurance, her inaction, demonstrates, at minimum, "a pattern of carelessness or inattentiveness" or gross irresponsibility that requires the specification of a 1.65 issue. Her failure to disclose that the site had been sold in April 1992 was deceptive and shows a cavalier disregard for her responsibility to be absolutely candid with the Commission. Brent's reporting failures with respect to her site require the specification of a 1.65 issue.⁴

C. The "Lost" Balance Sheet

Huber also demonstrated that a Section 1.65 issue was warranted because Brent had failed to timely report that the balance sheet she had allegedly relied upon to certify to her financial qualifications was lost or misplaced. Huber demonstrated that the Presiding Judge's ruling in Mark Allen Bodiford, FCC 90M-392 (released February 28, 1990) required the addition of an issue. As with the transmitter site, no statement is provided from Brent, and her attempt to distinguish Bodiford is unavailing. Her failure to report the

⁴ Brent's attempt to compare the sale of her site to the name change of Huber's bank (Brent Opposition, P. 10 n.12) is fallacious. As Huber has shown, she had no obligation to report the name change because it had no impact on her financial qualifications. See Memorandum Opinion and Order, FCC 93M-423 (released June 28, 1993). The sale of Brent's site, however, clearly impacted the site's availability and had to be reported.

loss, provides an independent basis for specifying an 1.65

to report the loss of her balance sheet, which was the sole basis for her financial qualifications.

Brent's failure to report occurred under circumstances just as suspicious as the circumstances raised in Bodiford. Huber's petition seeking a financial qualifications issue squarely raised the question of whether Brent had the necessary documentation in hand when she certified. Brent came back with a declaration in which she claimed she had a balance sheet when she certified, but she hid from the Presiding Judge that the balance sheet had been "lost or misplaced." Brent may not play games with the Presiding Judge. She had an obligation to report all facts, favorable and unfavorable, that were pertinent to Huber's petition.

did not provide any declaration. The requested issues must be added.

Accordingly, Huber asks the Presiding Judge to specify the requested issues.

Respectfully submitted,

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CERTIFICATE OF SERVICE

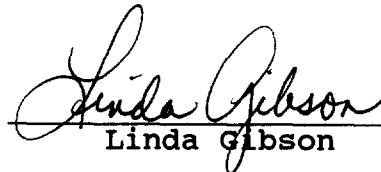
I, Linda Gibson, do hereby certify that on the 2nd day of August 1993, a copy of the foregoing "Reply To Opposition To Second Petition To Enlarge Issues Against Rita Reyna Brent" was sent first-class mail, postage prepaid to the following:

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